FILED
NOV 23 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 537

CLAUDE E. SPRIGGS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

CLAUDE E. SPRIGGS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 25, 1955.

CITATION TO OPINION BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals for the Ninth Circuit, printed as Appendix A hereto, is reported in 225 F. 2d 865.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1955. Rehearing was denied on September 23, 1955. The time for filing this petition for a writ of certiorari has been extended by Mr. Justice Douglas to and including November 23, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the reversal of a criminal conviction for insufficient evidence, unaccompanied by any direction of a new trial and followed by a dismissal of the action by the trial court, barred a second indictment and trial by reason of former jeopardy.

2. Whether the retrial of two items in a bill of particulars which had been stricken from consideration in the first trial and which had been the subject of a successful plea in bar in the second proceeding violated the doctrines of double jeopardy and res judicata.

3. Whether a determination that the evidence produced at the first trial is insufficient to sustain a conviction is the law of the case so as to render insufficient the production of substantially the same evidence at the second trial.

CONSTITUTIONAL PROVISION INVOLVED

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *" Fifth Amendment, Constitution of the United States.

STATEMENT OF THE CASE

On April 3, 1951, petitioner was indicted on three counts of wilfully attempting to defeat and evade his income taxes for the years 1944, 1946 and 1947, in violation of 26 U.S.C. § 145(b), by filing false and fraudulent tax returns (Ex. D, 3-5).[1] Petitioner moved for a bill of particulars, which the Government supplied as to each of the counts in question (Ex. D. 5-8). Following the Government's presentation of its case, petitioner moved for a judgment of acquittal as to each count on the ground that the evidence adduced failed to substantiate the allegations of the indictment. He also moved to strike the portions of the bill of particulars which corresponded with each count.

The court ordered that the motion for judgment of acquittal and the motion to strike be granted as to the first two counts of the indictment. See Appendix B hereto. The motion for judgment of acquittal as to Count III was denied, but the motion to strike the corresponding portions of the bill of particulars was granted as to two particulars:

(a) alleged unreported taxable capital gains of $1,618.15 on the sale of the "Collins" property;
(b) alleged unreported taxable capital gains of $544.64 on the sale of the "Eastwood" property.

As a result, only one item of the portion of the bill of particulars dealing with the third count was left and was submitted to the jury. This item was:

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[1] Exhibit D is a part of the transcript of record now before this Court and consists of the transcript of record originally filed in the Court of Appeals in connection with petitioner's appeal from his first conviction.

(c) alleged overstatement of depreciation in the amount of $2,978.60 on the "Henshaw Road" property, the specific charge being that the overstatement was the result of a false representation of the cost of the property. See Appendix B hereto.

The jury was instructed to disregard the allegations of the first two counts of the indictment and to disregard any evidence relating to items (a) and (b) of the bill of particulars as to the third count. See Appendix B hereto. A verdict of guilty was thereafter rendered (Ex. D, 18), necessarily being based solely on the evidence as to item (c) of the bill of particulars dealing with Count III, namely, the depreciation item. Petitioner thereafter filed motions for judgment of acquittal notwithstanding the verdict and for a new trial, both of which were denied (Ex. D, 19-21). He was fined $1,000 and costs of not less than $500. He then filed a notice of appeal, claiming that the District Court had erred in denying his motion for judgment of acquittal made at the conclusion of the Government's case and in denying his motion for judgment of acquittal notwithstanding the verdict. In support of both alleged errors, petitioner contended that there was no competent evidence adduced during the trial to support the verdict (Ex. D, 24-26). No appeal was taken from the District Court's denial of the motion for a new trial.

The Court of Appeals for the Ninth Circuit agreed that the Government's evidence, limited as it was to statements made by the petitioner himself, was "insufficient to sustain the conviction, for there has been no independent proof of any crime having been committed." The judgment was accordingly "reversed."

There was no additional command for a new trial or for further proceedings consistent with the opinion. *Spriggs* v. *United States,* 198 F. 2d 782 (C.A. 9, 1952). In the course of its opinion, the Court of Appeals made reference to the lower court proceedings as follows (198 F. 2d at 782):

> Upon trial, appellant was acquitted on Counts I and II upon his motion for a directed verdict of acquittal. He was also *acquitted* upon portions of Count III. [Emphasis added].

Following the reversal of the judgment, petitioner's counsel entered into a stipulation on October 14, 1952, with the United States Attorney reading as follows (Ex. G):

> It is hereby stipulated ... *that by reason of the mandate of the appellate court,* spread upon the record in the above entitled court [cause] on the 13th day of October, 1952, the above entitled court [cause] may by the order of this court be dismissed and the sum of Fifteen Hundred ($1500.00) Dollars heretofore deposited in the registry of this court, as fine and court costs, be, by order of this court, returned to defendant, CLAUDE E. SPRIGGS. [Emphasis added].

On the next day, the District Court entered the following order (Ex. G):

> By reason of the above and foregoing Stipulation in the above entitled cause:
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above entitled action, UNITED STATES OF AMERICA, plaintiff, v. CLAUDE E. SPRIGGS, defendant, Cause No. C 9558 Phx. is hereby dismissed and the Clerk of this Court is hereby ordered to pay to Claude E. Spriggs, the sum of $1500.00, heretofore deposited in the registry of this court as fine and Court costs.

Subsequently, on February 26, 1953, a new indictment was returned against the petitioner (R. 3). This indictment contained but one count, alleging that he wilfully attempted to defeat and evade his income tax due for the year 1947, in violation of 26 U.S.C. §145 (b), by filing a false and fraudulent tax return. Save for an inconsequential difference of a few pennies in the alleged amounts of net income reported and due, the indictment was identical in terms with the third count of the 1951 indictment.[2]

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[2] Count III of the first indictment filed in 1951 read:

> That on or about the 7th day of January, 1948, at Phoenix, County of Maricopa, State and District of Arizona, Claude E. Spriggs did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, a false and fraudulent income tax return wherein it was stated that his net income for said calendar year was the sum of $1,928.19 and that the amount of tax due thereon was none, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $7,048.95, upon which said net income there was owing to the United States of America an income tax of $1,058.03. (Ex. D, 4-5).

In contrast, the indictment filed in 1953 read in its entirety as follows:

> That on or about the 7th day of January, 1948, at Phoenix, County of Maricopa, State and District of Arizona, Claude E. Spriggs did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, a false and fraudulent income tax return wherein it was stated that his

Petitioner's motion to dismiss the new indictment (R. 4) on grounds of double jeopardy was denied. He also filed a plea in bar (R. 6) on the ground that any further prosecution would place him in double jeopardy. The District Court at first denied the plea in bar, as evidenced by a minute entry dated February 10, 1954 (R. 18). Upon further consideration, the District Court on February 25, 1954, signed and entered a formal order granting the plea in bar "with respect to the specific items of alleged unreported income." The court denied the plea only "with respect to the specific items of alleged fraudulent depreciation" (R. 18-19).[3] The Government, more than two weeks later, moved for a rehearing on the plea in bar, and filed a memorandum in support of the motion (R. 19-28). The District Court on March 22, 1954, granted the rehearing and vacated its prior order of February 25, 1954, which had granted the plea in part (R. 28-29). The result was to deny in toto the plea in bar. The court also denied (R. 35) petitioner's motion to dismiss the indictment on grounds of res judicata (R. 29).

In this second proceeding, the Government responded to petitioner's motion for a bill of particulars

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net income for said calendar year was the sum of $1,928.17 and that the amount of tax due thereon was none, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $7,049.15, upon which said net income there was owing to the United States of America an income tax of $1,058.03. (R. 3).

[3] The "specific items of alleged unreported income" referred to items (a) and (b) in the bill of particulars (the "Collins" property and the "Eastwood" property). The "specific items of alleged fraudulent depreciation" referred to item (c) in the bill of particulars (the "Henshaw Road" property).

by producing the identical particulars (R. 16-17) as had been supplied as to the third count of the first indictment. The particulars thus produced were:

(a) alleged unreported taxable capital gains of $1,618.15 on the sale of the "Collins" property;

(b) alleged unreported taxable capital gains of $544.64 on the sale of the "Eastwood" property;

(c) alleged overstatement of depreciation in the amount of $2,978.60 on the "Henshaw Road" property, the specific charge being that this overstatement resulted from a false representation of the cost of the property.

Following a jury trial, in which all three items were submitted to the jury, petitioner was found guilty as charged in the indictment (R. 36-37), a fine of $1000 was imposed (R. 42-43), and an appeal was duly taken.[4] The Court of Appeals for the Ninth Circuit affirmed the conviction. 225 F. 2d 865 (C.A. 9, 1955); Appendix A hereto. The Court of Appeals held:

(1) The dismissal of the first indictment with petitioner's consent did not terminate the Government's right to reindict him. His consent "waived all technical objections."

(2) The District Court, by reversing its grant of the plea in bar as to items (a) and (b) of the bill of particulars, did not in effect reindict the petitioner. Such a grant was never in fact made and the entry of the order granting the plea in bar was an inadvertence; hence the so-called reversal was merely an order con-

[4] Petitioner's motions for judgment of acquittal notwithstanding the verdict and for a new trial had been denied. (R. 41-42).

forming the record with the judge's oral and true pronouncement.

(3) The previous appeal did not result in any acquittal by the Court of Appeals. While the judgment had been reversed there had been no direction that the proceeding be dismissed. But even "if there had been an acquittal, this disposition could not have prevented the retrial of the charges as to 'Collins' and 'Eastwood' transactions, which had never been presented to the first jury and on which defendant had never been in jeopardy." The District Court's order sustaining the motion to strike items (a) and (b) from the bill of particulars in the first trial did not "acquit" petitioner as to these items. The reference in the court's opinion in the first appeal, 198 F. 2d at 782, to an acquittal on those items was not intended to discharge petitioner "and certainly this Court could not free him upon charges which were not presented to the jury for judgment."

(4) There was sufficient evidence in this second proceeding to sustain the the jury's verdict of guilty.

REASONS FOR GRANTING THE WRIT

This case involves important and novel questions concerning the administration of criminal justice in federal courts in the context of the provision of the Fifth Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" and in the context of the doctrines of res judicata and the law of the case. Those questions have been resolved by the Court of Appeals in a manner that conflicts with pertinent precedents established by this Court and other tribunals. Petitioner has thereby been deprived of his constitutional and legal right to be free

of repeated jeopardy and harrassment. Under such circumstances it is appropriate and necessary that this Court's certiorari jurisdiction be invoked in order that fundamental principles of fair criminal procedure may be protected from the invidious inroads made by the court below and that a grave miscarriage of justice may be corrected.

1. The reversal of petitioner's first conviction, followed by a dismissal of the action against him, barred the second indictment and trial by reason of former jeopardy

It is well established that in certain circumstances "a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted." *Ball* v. *United States,* 163 U.S. 662, 672 (1896); and see *Francis* v. *Resweber,* 329 U.S. 459, 462 (1947); *Bryan* v. *United States,* 338 U.S. 552, 560 (1950). No double jeopardy is involved in the new trial or the new indictment in such cases.

But this is not such a case. Here the reversal of the first conviction constituted an acquittal so that a new trial or a new indictment did create double jeopardy within the meaning of the Fifth Amendment.

In his first trial, petitioner was acquitted by the trial judge on the first two counts of the indictment because of the insufficiency of the Government's evidence. Two of the three particulars relating to the third count were also struck because of a failure of proof on the Government's part. Thus there was left for the jury's consideration only that portion of the third count which related to the alleged overstatement of depreciation in the 1947 tax return. But the Court

of Appeals, on appeal from the judgment of conviction, found that the Government had also failed to prove its case as to that surviving portion of the third count. The judgment of conviction was accordingly "Reversed." 198 F. 2d 782, 783.

Since the decision by the Court of Appeals clearly indicates that there was insufficient evidence to support the verdict upon the third count, the trial judge, as a matter of law, should have acquitted the petitioner on the entire third count for lack of evidence to substantiate the allegations. The trial court erred in failing to direct an acquittal at the conclusion of the Government's case. Petitioner's right to acquittal on the third count was identical with and indistinguishable from his right to acquittal on the first two counts, there being insufficient evidence to support any of the counts.

The conclusion seems inescapable that the Court of Appeals, by its peremptory reversal of the judgment without directing either a new trial or other further proceedings, recognized and gave effect to petitioner's right to acquittal on the third count. As has been said by the same Court of Appeals in another case involving a reversal for insufficient evidence to sustain the jury's verdict of guilty, *Karn* v. *United States,* 158 F. 2d 568, 573 (C.A. 9, 1946):[5]

> When a motion for a directed verdict was made, the trial judge, as a matter of law, should have instructed the jury to render a verdict of acquittal.

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[5] See also *United States* v. *Renee Ice Cream Co.*, 160 F. 2d 353, 357-8 (C.A. 3, 1947); *United States* v. *Bozza*, 155 F. 2d 592, 596-7 (C.A. 3, 1946); *United States* v. *Gardner*, 171 F. 2d 753, 759 (C.A. 7, 1948).

> The right of appellant to a verdict of acquittal fully matured when he made his motion. To remand the case with directions to grant new trial would, in our judgment, be a serious invasion of rights which accrued to him in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind.

Thus the statement of the Court of Appeals that it "Reversed" the judgment involved in the first appeal must be interpreted as giving the petitioner the benefits of the full acquittal to which he was entitled. Otherwise petitioner would be unprotected from "a serious invasion of rights which accrued to him in the lower court" and he would be stripped of "the real effectiveness of a reversal on appeal in cases of this kind." This conclusion is not in derogation of the power of the Court of Appeals under 28 U.S.C. § 2106 to remand for a new trial following a reversal or to enter any other judgment it might have considered appropriate and just under the circumstances. See *Bryan* v. *United States*, 338 U.S. 552 (1950).[6] The important fact is that the court below did not specify that a new trial should be had; nor did it even remand the case for further proceedings. This the court could easily have done if in its sound discre-

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[6] To come within the rule of the *Bryan* case, the exercise of the discretion of the Court of Appeals in remanding for a new trial after a reversal upon the grounds of insufficient evidence should plainly appear. The sound exercise of this discretion is an accused's only protection against repeated prosecutions by a United States Attorney without sufficient evidence to convict. Such repeated prosecutions result in violation of the accused's constitutional rights against being twice—or thrice or more times—tried for the same offense.

tion it had intended to do so.[7] But in the absence of some such specific direction of further proceedings, authorization for a new trial or a new indictment should not be readily assumed or implied. A defendant's constitutional right to be free from double jeopardy is too important to be modified or destroyed by equivocal or unexpressed intentions of the appellate court.

The attempt of the Court of Appeals in its second opinion to imply that it had intended something more is ineffectual. The Court of Appeals refers to and relies upon the fact that at the conclusion of the first trial, along with his motion for judgment of acquittal notwithstanding the verdict, the petitioner had made a motion for a new trial. Since "upon appeal this Court upheld his contention, he cannot complain that the cause was sent back for a new trial." 225 F. 2d at 869. However, there is not the slightest indication that the Court of Appeals' action in the first appeal had any reference to the motion for a new trial. Indeed, the record is to the contrary. The denial of the motion for a new trial was not assigned as error in petitioner's statement of points on which he intended to rely upon the first appeal (Ex. D, 25-26). Hence the trial court's ruling on the motion for a new trial was not before the Court of Appeals.

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[7] Where it has thought it appropriate and just, the court below has expressly remanded cases for new trials after reversing convictions on grounds of insufficient evidence. In such cases, the court's intention was clear and unmistakable. See for example, *Buhler* v. *United States*, 33 F. 2d 382, 385 (C.A. 9, 1929), where the opinion concluded: "The judgment will therefore be reversed, with directions to grant a new trial."

Had the Court of Appeals reversed and directed that a judgment of acquittal be entered it would be incredible to suggest that a new trial or a new indictment would be justified merely because at some point in the trial court proceedings the defendant had made a motion for a new trial. *Sapir* v. *United States,* 348 U.S. 373 (1955), clearly holds that jeopardy attaches when an appellate court orders a judgment of acquittal entered for lack of evidence to support the jury's verdict of guilty. The mere fact that the defendant made a motion for a new trial, a motion that was denied by the trial court and as to which no appeal was taken, could not prevent jeopardy from attaching to such a judgment of acquittal. The denial of any protection against repeated trials is too high a price to put upon a routine motion made during the course of a trial unless the Court of Appeals affirmatively believes and expressly states that the ends of justice require a new trial.

Even as a matter of semantics, the use by the Court of Appeals of the sole word "Reversed" in its first opinion could only mean that the verdict of the jury and the judgment of the trial court were set aside, annulled and vacated. The case was at an end. *Walsh Const. Co.* v. *United States Guarantee Co.,* 76 F. 2d 240, 242 (C.A. 8, 1935); *Securities & Exchange Commission* v. *C. M. Joiner Leasing Corp.,* 53 F. Supp. 714 (N.D. Tex., 1944); *Donnell* v. *Wright,* 199 Mo. 304, 97 S. W. 928 (1906). A mere reversal, without more, does not usually imply a remand of the case for a new trial or justify the issuance of a new indictment. Especially is this true where the accompanying opinion of the appellate court reveals a final disposition of the merits of the case. See *Steinman* v. *United*

States, 185 F. 47 (C.A. 3, 1911). Here the opinion of the Court of Appeals completely disposed of the remnants of the first indictment against petitioner by holding that the conviction thereunder was unsupported by the evidence. Thus the otherwise cryptic word "Reversed" assumed a full and clear meaning, a meaning which precluded a new trial. For when "the merits of a case have been once decided by this court on appeal, the ... [lower court] has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer." *In re Potts,* 166 U.S. 263, 267 (1897); see also *Sapir* v. *United States,* 348 U.S. 373 (1955).[8]

The court below noted in its second opinion now under review, 225 F. 2d at 868, that the reversal of the first conviction did not discharge the petitioner and did not set aside the indictment. Indeed, it was precisely this lack of affirmative directions that led the petitioner and the Government to stipulate that the action might be dismissed by the trial court. They did so expressly *"by reason of the mandate of the appellate court,"* a mandate that spoke simply in terms of reversal. Since the Court of Appeals had not specified that the petitioner be discharged, the indictment set aside, the action dismissed or the fine remitted, it was both appropriate and necessary that some such ministerial action take place in the District Court. The petitioner might have proceeded by motion; or the United States Attorney might have made an appro-

[8] See also *Pottsville Broadcasting Co.* v. *Federal Communications Commission,* 105 F. 2d 36, 39 (C.A.D.C., 1939); *United States* v. *Northwestern Telegraph Co.,* 52 F. Supp. 973, 974 (D. Conn., 1943).

priate motion in order to activate the necessary ministerial process of dismissing the action and freeing the petitioner from the jurisdiction of the trial court. A stipulation was an equally appropriate way of getting this process under way. The stipulation and order of dismissal were thus the natural and intended consequences of the mandate of reversal emanating from the Court of Appeals.[9]

Petitioner's stipulated consent to the dismissal of the cause did not constitute any waiver of "technical defects" as the court below asserted. 225 F. 2d at 867. Nor did it mean that petitioner acknowledged the authority to return a new indictment against him. The stipulation was merely one way of putting into operation the machinery necessary for effectuating the mandate of the appellate court and giving final substance to his right to acquittal and dismissal.

It necessarily follows from the reversal of the first conviction by the Court of Appeals and the dismissal of the action by the District Court that petitioner was acquitted of all charges contained in the first indictment. Such an acquittal was the only way by which the reversal on appeal could have any real meaning and effect under these circumstances. As in *Sapir* v. *United States,* 348 U.S. 373 (1955), jeopardy attached to such an acquittal and precluded any further indictment or trial on the same charge.

It seems apparent that the Court of Appeals now feels that its reversal of petitioner's first conviction

[9] It is thus unnecessary to decide whether the dismissal fell within Rule 48 of the Federal Rules of Criminal Procedure or whether it was a common law "nolle prosequi" as distinguished from a "dismissal with prejudice."

was incorrect. It therefore seeks to erase this assumed error by ignoring established principles and precedents. In so doing, the court below creates real errors of the greatest magnitude. Prime among these is its deliberate denial that the second indictment and trial on the identical charges involved in the prior proceeding constituted double jeopardy as outlawed by the Fifth Amendment. This refusal to heed petitioner's constitutional rights raises serious and important issues in the administration of criminal justice in the federal courts and in the application of this important constitutional principle. These issues deserve the full consideration of this Court on review by certiorari.

2. The retrial of the two particulars which had been struck from consideration in the first trial and which had been the subject of a successful plea in bar in the second proceeding violated the doctrines of double jeopardy and res judicata

During petitioner's first trial, the two capital gains items—items (a) and (b)—were stricken from the bill of particulars supplied in connection with the third count. They were stricken because of the insufficiency of the Government's supporting evidence and the jury was instructed to disregard them. When these same two items appeared again in connection with the second indictment, petitioner filed a plea in bar in which he alleged that he had been put in jeopardy at the first trial both as to items (a) and (b) and as to item (c), the depreciation item. The trial judge granted the plea as to items (a) and (b) and denied it as to item (c). This order was vacated nearly a month later and the plea in bar denied in toto. Out of this procedural situation arise two important and novel questions as to the applicability of the doctrines of double jeopardy and res judicata: (1) Did the strik-

ing of items (a) and (b) from the bill of particulars in the first trial amount to an acquittal as to those items? (2) Did the grant of the plea in bar as to those items in the second proceeding preclude, on grounds of res judicata, a revocation of that grant and a trial as to the items?

The striking of the items. The furnishing of the bill of particulars, of which items (a) and (b) were elements, concluded "the rights of all parties who are to be affected by it, and he who has furnished the bill of particulars under it, must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration." *Commonwealth* v. *Giles,* 1 Gray 466, 469, 67 Mass. 466, 469 (1854), quoted approvingly in *Land* v. *United States,* 177 F. 2d 346, 349 (C.A. 4, 1949), and *United States* v. *Neff,* 212 F. 2d 297, 309 (C.A. 3, 1954). Otherwise stated, the bill of particulars strictly limited the prosecution to proof within the area of the bill as though the particulars were actually part of the indictment itself. *United States* v. *Neff, supra; United States* v. *Pierce,* 245 F. 888 (N.D.N.Y., 1917).

When the trial judge, at the close of the Government's case in the first trial, struck items (a) and (b) from the bill of particulars because of the inadequacies of the supporting proof he was eliminating two of the three items of proof to which the Government was confined in its prosecution of the third count of the indictment. For all practical purposes those three specified items were the ingredients of the third count of the indictment. Had all three been found wanting in supporting proof (as the District Court and the Court of Appeals together held) a judgment of acquittal as to

the third count would have been entered. In finding that two of the three particulars lacked the necessary support of proof and in removing them from the jury's consideration, the court was exercising the same legal power that enabled it to acquit the petitioner on the first two counts of the indictment for failure of proof.

In this context there is no meaningful difference between a judgment of acquittal as to an entire count of an indictment and a judgment striking two-thirds of the essential ingredients of a count. Both judgments take matters away from the jury because the evidence is insufficient to sustain a conviction. Both judgments are clearly incidental to, and necessarily flow from, the judicial function of determining the legal sufficiency of the evidence. The court has inherent power to invoke these procedural devices in the course of its administration of criminal justice. See *Ex parte United States*, 101 F. 2d 870 (C.A. 7, 1939), aff'd by equally divided Court, 308 U.S. 519 (1939).

Thus it may accurately be said that striking items (a) and (b) had all the practical and legal elements of a judgment of acquittal as to those items and that jeopardy attached thereto. Indeed, such was the view of the court below on the first appeal when, in speaking of the striking of these items, it stated that petitioner "was also acquitted upon portions of Count III." 198 F. 2d at 782. The action of the trial judge in originally granting the plea in bar as to these items in the second proceeding further evidenced the judicial understanding that striking the items bore all the earmarks of an acquittal. See also *Parish* v. *State*, 165 S.W. 2d 748 (Tex. Cr. App., 1942), and *State* v. *Love*, 236 N.C. 344, 72 S.E. 2d 737 (1952), where the action of the trial judge in withholding from the jury a count

of the indictment was held to be equivalent to quashing that count or directing a verdict of not guilty.

The court below asserted that jeopardy could not attach to the striking of items (a) and (b) because those items had never been presented to the jury at the first trial. 225 F. 2d at 868. Such an assertion is a gross misstatement of the law of jeopardy. As the same court has recognized on other occasions, jeopardy ordinarily attaches—with exceptions not here relevant—when the jury is sworn in to try the case. *Himmelfarb* v. *United States*, 175 F. 2d 924, 932 (C.A. 9, 1949); and see *Carrado* v. *United States*, 210 F. 2d 712, 719 (C.A.D.C., 1953); *Hunter* v. *Wade*, 169 F. 2d 973, 975 (C.A. 10, 1948). Withdrawal of a matter from the jury's consideration does not negate the possibility, which in this case is a reality, that jeopardy attached long before and quite apart from the submission of the case to the jury.

The granting of the plea in bar. The statement of the Court of Appeals, 225 F. 2d at 868, that the plea in bar was never actually granted in the second proceeding as to items (a) and (b) and that the signing of an order granting such a plea was an inadvertence is entirely misleading and wholly unsupported by the record. It is plain from the record that the plea was originally denied (R. 18) and then formally granted as to the two items (R. 18-19). Several weeks later the Government moved for a rehearing on the plea in bar (R. 19), and filed a memorandum of law in support of the motion (R. 20-28), actions totally inconsistent with any supposition that the plea in bar had not in fact been intentionally granted.[10] It was only after full

[10] The brief filed by the Government in the court below makes no contention that the partial grant of the plea in bar was an

consideration had been given to the Government's request for rehearing and to its opposition to the prior grant of the plea in part that the grant was vacated. There is not the slightest suggestion in the record that this act of vacating was to rectify an inadvertence.

The record thus establishes that the plea in bar was in fact granted as to items (a) and (b). The conclusion follows that this grant was an irrevocable determination of petitioner's right to be free of any further trial in connection with those items. That grant assumed the mantle of res judicata in this respect and protected petitioner against any subsequent reversal of the grant or any subsequent trial involving items (a) and (b).

Granting the plea in bar, in accordance with petitioner's contention that he had been jeopardized as to these two items in the first proceeding, was in itself a judgment of acquittal. It has long been established that a judgment of acquittal on a plea in bar, such as one involving the statute of limitations or double jeopardy, is conclusive of the defendant's rights and protects the defendant from any further jeopardy.

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inadvertence. The situation as revealed by the record is accurately summarized by the Government at page 14 of its brief below: "The first order, above mentioned, granted the plea in bar with respect to the mentioned paragraphs of response to motion for bill of particulars; the second of the orders vacated it. The result was to reinstate paragraphs (a) and (b) of the Response to Motion for Bill of Particulars as a part of appellee's case."

In *Hill* v. *Wampler*, 298 U.S. 460, 464, (1936), this Court held that an order entered upon the records of a court is to be presumed to mean what it says. If an entry is inaccurate or varies from an oral pronouncement, remedies are available for making the correction upon the records. Otherwise, a court will close its ears to any suggestion that the entry is inaccurate.

United States v. *Oppenheimer,* 242 U.S. 85, 87 (1916); *United States* v. *Johnson,* 76 F. Supp. 542 (M.D. Pa. 1947), aff'd 165 F. 2d 42 (C.A. 3, 1947), cert. denied 332 U.S. 852 (1948). Once the plea in bar has been granted, the doctrine of res judicata becomes effective. The failure of the court below to recognize and apply that doctrine in the setting of this case is a further indication of the need for and the appropriateness of this Court's review of the case. The partial granting of the plea in bar and then the attempted reversal of the order, like the attempted reversal of the judgment of acquittal in *Sapir* v. *United States,* 348 U.S. 373 (1955), had the effect of putting the petitioner again in jeopardy on the very same two issues as to which he had once been discharged.

3. Since the evidence adduced at the second trial as to the depreciation item was substantially the same as that produced at the first trial, the law of the case established the insufficiency of the evidence at the second trial

The Court of Appeals reversed the first conviction of the petitioner since it found insufficient evidence to sustain the only element then left in the case, the alleged overstatement of depreciation on the "Henshaw Road" property. 198 F. 2d 782. The evidence that was produced, consisting solely of testimony relating to admissions and statements made by the petitioner himself, was found to be fatally deficient in that there was "no independent proof of any crime having been committed."

At the second trial, the Government again sought to prove the alleged overstatement of depreciation on this particular property. Again, its principal evidence took the form of testimony by a revenue agent as to certain confessions, admissions and conversations which petitioner had allegedly made to or had with him (R. 180-220).

It is obvious that the evidence produced by the Government's second effort with respect to the alleged overstatement of depreciation is entitled to no greater respect than its first, which the Court of Appeals had held was inadequate. This holding, being the law of the case laid down by the Court of Appeals, is binding upon the second trial as well. At both trials the Government failed to present independent proof of the overstatement. By virtue of the first ruling of the Court of Appeals that such evidence was insufficient the same result must follow as to the evidence on this allegation in the second trial. As has been said, *Carpenter* v. *Durell,* 90 F. 2d 57, 58 (C.A. 6, 1937):

> The doctrine of the law of the case ... is always applied where the former decision relates to the sufficiency or insufficiency of the evidence. When the case comes up the second time and the evidence is substantially the same, a former decision is conclusive.

See also *United States* v. *DeAngelo,* 138 F. 2d 466, 468 (C.A. 3, 1943); *Baltimore & O. R. Co.* v. *Deneen,* 167 F. 2d 799, 800 (C.A. 4, 1948); *Thompson* v. *Maxwell Land Grant Co.,* 168 U.S. 451, 456 (1897).

Petitioner, having been placed in jeopardy by the reversal and dismissal of the first proceeding, was entitled to constitutional protection against the second indictment and trial. But even viewing the second trial apart from considerations of double jeopardy, the conviction cannot stand. The attempt by the Court of Appeals to supply the independent proof requisite to sustain the judgment of conviction is inadequate. Its reliance on the evidence relating to the two capital gain items—items (a) and (b)—should not succeed because the evidence adduced upon these points was

never properly before the court by reason of the plea in bar which was granted in respect thereto. The insufficiency of the evidence as to item (c), the depreciation item, was established by the law of the case. Thus, there was nothing left to support the conviction.

Moreover, even if the evidence were such as to satisfy the necessities of independent proof as to item (c), the use of evidence relative to items (a) and (b) contaminated the general verdict of guilty rendered by the jury so as to compel a reversal of the conviction. As this Court held in *Maryland* v. *Baldwin,* 112 U.S. 490, 493 (1884), if upon any one issue error was committed, as upon the admission of evidence, the verdict cannot be upheld "for it may be that by that evidence the jury were controlled under the instructions given."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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November 23, 1955

APPENDIX

APPENDIX

APPENDIX A

CLAUDE E. SPRIGGS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 14409.

United States Court of Appeals
Ninth Circuit.

April 25, 1955.

Rehearing Denied Sept. 23, 1955.

Claude E. Spriggs, Jack C. Cavness, Phoenix, Ariz., for appellant.

Jack D. H. Hays, U. S. Atty., Robert S. Murlless, Asst. U. S. Atty., Phoenix, Ariz., for appellee.

Before STEPHENS, POPE, and FEE, Circuit Judges.

JAMES ALGER FEE, Circuit Judge.

Defendant was indicted February 26, 1953, on a charge of attempting to defeat and evade his income tax[1] for the year 1947, and was convicted by a jury on April 5, 1954. Judgment and sentence followed, from which this appeal was taken.

The history of a previous conviction on a substantially similar charge must be reviewed for an understanding of the points raised herein. An indictment returned against Spriggs on April 3, 1951, contained three counts. He was acquitted on the first two counts, which relate to other years, and we concern ourselves only with Count III, which seems to have been in the same terms as the single count of the present indictment. A bill of particulars was granted as to the first indictment. The particulars specified as to Count III were (a) unreported taxable capital

[1] 26 U.S.C.A. § 145(b).

gains of $1,698.15 on the sale of the "Collins" property, (b) unreported taxable capital gains of $544.64 on the sale of the "Eastwood" property, and (c) overstatement of depreciation on the "Henshaw Road" property. The specific charge as to the latter was a false representation of cost.

A jury was impaneled and the trial was held. During the course thereof, defendant moved for the striking of portions of the bill of particulars as to Count II and for judgment of acquittal as to that count. Both motions were granted by the trial judge then presiding. There is no question as to this count, and the judgment of acquittal thereon was a finality.

At the same time, defendant moved for judgment of acquittal on Count III, which the trial judge then presiding denied and submitted this count to the jury. However, motion to strike portions of the bill of particulars was allowed. The proceeding was as follows:

> "Counsel for defendant now moves for Judgment of Acquittal as to Count 3 of the Indictment on grounds and for the reasons the evidence adduced does not sustain the allegations of Count 3 and moves to strike portions of Bill of Particulars as to Count 3.
>
> "It is Ordered that subdivisions (a) and (b) of said Bill of Particulars as to Count 3 of the Indictment be stricken, and
>
> "It is Ordered that said Motion for Judgment of Acquittal as to Count 3 of the Indictment be denied."

The defendant was convicted by the jury on Count III, attenuated by the striking of (a) and (b) of the bill of particulars, by which it may be understood that evidence of these transactions was not to be considered by the jury.

Appeal was taken to this Court, and the judgment of conviction was reversed, *Spriggs* v. *United States*, 9 Cir., 198 F. 2d 782, on the ground that no sufficient evidence

was adduced to prove the corpus delicti independently of the admissions of defendant. Thereafter, based upon a stipulation of counsel for defendant and then United States Attorney, the indictment was dismissed.

The present indictment was returned by another grand jury advised by a new United States Attorney, and the cause came on for trial before Hon. Claude McColloch, sitting by assignment. A motion to dismiss the indictment, for bill of particulars, a "motion to dismiss (or quash) the indictment" and a plea in bar were presented. These were all eventually denied. However, after the court ruled that the so-called plea in bar was denied, the United States Attorney presented an order granting the plea in respect to the matters referred to as (a) and (b) above and denying the plea with respect to the fraudulent depreciation designated above as (c), which was entered by the court. The court subsequently vacated this order and entered an order in accordance with its previous oral ruling denying the plea in bar in toto.

On trial, there was a motion for mistrial because the opening statement of the prosecuting attorney contained references to the "Collins" property, referred to above in subdivision (a), and to the "Eastwood" property, referred to above in subdivision (b). These were denied by the trial judge. Evidence was introduced as to the alleged profit on these two transactions and on the alleged fraudulent depreciation referred to above in subdivision (c). At the close of the government's case, defendant moved to strike all matters relating to the "Collins" and "Eastwood" properties, which was denied. There were motions to dismiss the indictment and for judgment of acquittal because of res adjudicata, former jeopardy and insufficiency of the evidence.

These were denied, and, when renewed at the close of all the evidence, again denied. After conviction, defendant made a motion for judgment of acquittal, notwithstanding

the verdict, and motion for new trial. Both were denied. Defendant appeals the judgment of conviction.

The questions presented, according to the defendant, are:

> "1. Had the defendant been put in double jeopardy since there had been a prior acquittal upon items (a) and (b) of the Bill of Particulars?"
>
> "2. Does res judicata apply where defendant had previously been acquitted of the same offense as in (a) and (b) of Government's Bill of Particulars?"
>
> "3. May the Court, by its actions, re-indict a defendant after a plea in bar has been sustained?"
>
> "4. Is the evidence sufficient to sustain the verdict and judgment?"

The basis for all these points can be found in the record above summarized. The dismissal of the former indictment by consent of defendant did not terminate the right of the United States to reindict defendant within the period of the statute of limitations. The consent waived all technical defects. This dismissal of the indictment does not fall within Rule 48, Federal Rules of Criminal Procedure, 18 U.S.C.A., where consent by the court to the termination of the prosecution in that form by the United States Attorney is required. An order of dismissal thus entered is still only the "nolle prosequi" of common law as distinguished from a "dismissal with prejudice" and in the form entered here will not forbid the filing of a second indictment on the same charge. The point that Count III of the first indictment upon which defendant was convicted were in the same language is of no consequence. In any event, further submission to a grand jury was waived by consent of defendant, and the grand jury did reindict. In this there is no error.

The point that the District Judge reindicted the defendant by allowing a plea in bar as to the "Collins" and

"Eastwood" transactions and a subsequent document setting aside that earlier one carries its own refutation. A basic misunderstanding is illustrated. The journal entry or signed document is not the order of the court. The order of the court is the pronouncement made by the judge in open court.[2] The record shows the trial judge here denied the plea in bar from the bench. The entry presented by the United States Attorney and signed by the judge, apparently through inadvertence, was only evidence of the ruling. It could be set aside, as it was without effect upon the situation, and the entry made to conform to the true pronouncement.

The doctrine of double jeopardy, res adjudicata and collateral estoppel seem to be inextricably confused in the arguments presented here. No time will be wasted in technical distinctions and definitions. Suffice it to say that defendant was not prejudiced in any particular by the previous action of the trial court.

The argument that defendant was acquitted by this Court upon the previous appeal is offered. But there it was held only that there was insufficient "independent" evidence of the crime to permit the judgment to stand upon the admissions of defendant. It seems this Court thought there was an attempt to prove guilt on the net worth theory based upon expressions of defendant himself. The judgment of conviction was reversed. There was no direction that the proceeding be dismissed. Even if there had been an acquittal, this disposition could not have pre-

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[2] A judgment may be pronounced orally from the bench. As Chief Judge Magruder says: "the rules differentiate between a judgment and the 'entry' of the judgment, with the implication that the judgment must pre-exist before the clerk can perform the clerical or ministerial act of entering it." In re Forstner Chain Corporation, 1 Cir., 177 F. 2d 572, 576. Therefore, the doctrine of the text does not conflict with the line of cases such as the opinion of Judge Mathews in Rosenberg v. Heffron, 9 Cir., 131 F. 2d 80, which deal with the entry or docketing necessary to lay basis for appeal from a final order.

vented the retrial of the charge as to "Collins" and "Eastwood" transactions, which had never been presented to the first jury and on which defendant had never been in jeopardy. But defendant was not acquitted either by the trial judge or the jury in the previous case. Instead, the jury found sufficient evidence to convince them of his guilt beyond a reasonable doubt. He was not discharged by this Court.[3] A reversal sets aside the judgment, but allows the indictment to stand.[4] The intention of this Court is clearly shown by the recital contained in the opinion in the previous case to the effect that: "Appellant thereafter filed motions for judgment notwithstanding the verdict and for a new trial, both of which were denied. This appeal followed." 198 F. 2d at page 783. Since the defendant in this case asked for a new trial at the end of the previous case, and upon appeal this Court upheld his contention, he cannot complain that the cause was sent back for a new trial. See *Bryan* v. *United States*, 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335.

The reason there was not "independent" evidence in the first trial was that the trial judge there excluded any charge of evidence as to the "Collins" and "Eastwood" transactions. But sustaining a motion to strike the items from the bill of particulars did not "acquit" defendant upon these facts. In our opinion, the word "acquit" was used as to these specifications of the motion, but it was not the intention to discharge defendant, and certainly this Court could not free him upon charges which were

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[3] The direction on the review of the judgment in the first case reads "Reversed." 198 F. 2d 782, 783.

[4] "* * * it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted. * * * The court therefore rightly overruled their plea of former jeopardy * * *." United States v. Ball, 163 U.S. 662, 672, 16 S. Ct. 1192, 1195, 41 L. Ed. 300. See State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 462, 67 S. Ct. 374, 91 L. Ed. 422.

not presented to the jury for judgment. The jury never had a chance previous to the trial on the instant indictment to pass upon them. If they had acquitted, there might have been an end to the prosecution. But they convicted.

We find by an examination of the evidence that there was sufficient foundation for the jury to find defendant guilty beyond a reasonable doubt. The record in the instant case was different from that on the previous appeal.

Affirmed.

APPENDIX B

Excerpts from Petitioner's Exhibit D

(Transcript of Record on appeal from first conviction)

(p. 172) Mr. Choisser: We next move for judgment of acquittal as to count 3 in the indictment, upon the grounds and for the reasons that the evidence adduced does not sustain the allegations of count 3 of the indictment, and to proceed with that, we have Item "A" in the bill of particulars on count 3, which is the sale of a piece of property to one Jesse Arreola. As a matter of fact, all of these are in the same category. There was no evidence at all as to the purchase price on any of these three.

The Courts: Lots 7 and 8.

Mr. Choisser: Lots 7 and 8, Block 15.

* * * * * * * * * *

(p. 173) The Court: There is nothing here to show that he sold it or the price that he sold it for.

Mr. Thurman: Yes, that he sold it, but we weren't able to show by the records of the Title Company the initial price that Mr. Spriggs paid for it, is that correct?

The Court: All right, that is stricken.

Mr. Choisser: Now, the same, I think, if your Honor please, applies to Item "B". That was the sale of Lot 5

to Howard M. Vandenberg. That concerns the acquisition of that property from a Mrs. Fisher, I believe, and there is no evidence whatsoever concerning Mrs. Fisher or of that transaction.

The Court: Do you recall any evidence as to the purchase price of that property?

Mr. Thurman: No, the same fact situation, we relied upon the escrow. That is my recollection.

The Court: Well, that will be stricken, then. And the depreciation. Let's see, then, take the '47 return, and on Line 1, the figure, $2,601.32, you add the depreciation overstated of $2,978.60, so that figure would then be $5,579.91.

Mr. Choisser: Your Honor, may I be heard on that addition of depreciation overstated, $2,978.60? I again submit that there is no competent evidence from which that figure can be produced in any particulars.

The Court: There is evidence here upon which reasonable minds might differ.

* * * * * * * * * *

(p. 174) The Court: The motion for judgment of acquittal as to the 3rd count is denied. The defendant will be on his proof. We will resume at 10 o'clock tomorrow morning as to the 3rd count only.

* * * * * * * * * *

(p. 175) The Court: The record may show the defendant is present in person and by counsel and the jury is present and each one in place.

Gentlemen of the jury, on counts 1 and 2 of the indictment, motion for judgment of acquittal was granted by the Court, which means the defense is on his proof as to only count 3. For that reason, you will disregard in your deliberations and consideration the charges and allegations contained in count 1 concerning the calendar year '44 and the tax return in '45, and the charges contained in count 2 for the calendar year '46, the return filed on or about the 10th day of January, 1947. There remains the

count 3 relating to the income tax return filed on the 7th of January, 1948, for the taxable year '47.

Mr. Choisser: We reserve our opening statement. I wonder if your Honor will consider instructing the jury as to the items in the bill of particulars that they are only concerned with now. There are some of these, I believe, there was some testimony offered to the jury on those.

The Court: Yes, that is right. In connection with count 3, the bill of particulars furnished by the Government asserted that the claimed income was $7,048.95, consisting of the following items:

(p. 176) "Unreported taxable capital gains:

"(A) Taxable portion of profit on sale of Lots 7 and 8, Block 15, Collins Addition, Phoenix, Arizona, to Jesse Arreola," an item of $1,698.15.

No evidence was produced by the Government whatsoever on that item, neither Jesse Arreola, showing the cost price or the sale price, consequently, that item has been stricken from the bill of particulars, and the evidence concerning that you are to disregard except as I may instruct you later in the instructions.

"(B) Taxable portion of profit on sale of Lot 5, Eastwood Place, Phoenix, Arizona, to Howard M. Vandenberg," $544.64.

You will recall that Mr. Vandenberg testified as to what he paid for the lot to Mr. Spriggs, but there was absolutely no testimony introduced or any evidence of any kind showing what the defendant had originally paid for the lot, consequently, the item was stricken, or a total of $2,242.79.

There remains for consideration in connection with the trial the following item described in the bill of particulars as "Depreciation overstated." This item consists of the overstatement of depreciation by the defendant is the result of his having falsely represented the cost of the property located on Henshaw Road, Phoenix, Arizona, on which he claimed excessive depreciation in the amount of $2,978.60.

. . . . . .

(pp. 15-16, Minute Entry of Nov. 15, 1951).

Counsel for defendant now moves for Judgment of Acquittal as to Count 1 of the Indictment on ground the evidence adduced wholly fails to support or substantiate the allegations of Count 1 and moves to strike portions of the Bill of Particulars pertaining to Count 1.

It Is Ordered that said Motion to Strike and said Motion for Judgment of Acquittal be granted as to Count 1 of the Indictment.

Counsel for defendant now moves for Judgment of Acquittal as to Count 2 of the Indictment on ground the evidence adduced does not substantiate the allegations of Count 2 and moves to strike portions of Bill of Particulars as to Count 2.

It is Ordered that said Motion to Strike and said Motion for Judgment of Acquittal be granted as to Count 2 of the Indictment.

Counsel for defendant now moves for Judgment of Acquittal as to Count 3 of the Indictment on grounds and for the reasons the evidence adduced does not sustain the allegations of Count 3 and moves to strike portions of Bill of Particulars as to Count 3.

It Is Ordered that subdivisions (a) and (b) of said Bill of Particulars as to Count 3 of the Indictment be stricken, and

It Is Ordered that said motion for Judgment of Acquittal as to Count 3 of the Indictment be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 537

CLAUDE E. SPRIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals reversing the original judgment of the District Court is reported at 198 F. 2d 782. The opinion of the Court of Appeals affirming the present judgment of the District Court (Pet. 1a–7a; R. 257–262) is reported at 225 F. 2d 865.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1955. (R. 263.) [1] A petition

[1] Record references (R.) are to the transcript of the record of the second trial, involved here, which was reviewed by the Court of Appeals for the Ninth Circuit in Case No. 14409. Supplemental record references (Supp. R.) are to the transcript of the record of the first trial, reviewed below as Case No. 13258.

for rehearing was denied on September 23, 1955. (Pet. 1a; R. 264.) On October 19, 1955, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to November 23, 1955. The petition was filed on November 23, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the reversal of petitioner's previous conviction for insufficiency of the evidence barred a second indictment and trial on the same charge.

2. Whether, at the second trial, the Government was entitled to adduce additional evidence in proof of two items of unreported income which the jury had been instructed to disregard at the first trial because of the insufficiency of the Government's evidence.

3. Whether the Court of Appeals correctly found that the evidence at the second trial was sufficient for conviction though it had found the lesser evidence at the first trial insufficient.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to

collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On February 26, 1953, the grand jury for the District of Arizona returned an indictment against petitioner charging him with willful attempted evasion of his income taxes for the year 1947 in violation of Section 145 (b) of the Internal Revenue Code of 1939. The indictment alleged that petitioner had reported that his net income was $1,928.17 and that he owed no tax thereon, while he knew that his net income was $7,049.15, upon which he owed an income tax of $1,058.03. (R. 3–4.)

Petitioner was tried and found guilty (R. 36–37) and was sentenced to pay a $1,000 fine (R. 42–43). The Court of Appeals affirmed the conviction. (Pet. 1a–7a; R. 257–263.)

PROCEEDINGS UNDER THE FIRST INDICTMENT

Petitioner had previously been indicted and tried on the same charge of evading his taxes for 1947, as well as for the years 1944 and 1946. Before the first trial, the Government furnished a bill of particulars for the 1947 count, specifying the suppression of capital gains on two pieces of real estate, identified as the Collins and Eastwood properties, and overstatement of depreciation on a third piece of realty, referred to as the Henshaw property. (Supp. R. 8.) At the conclusion of the first trial, a verdict of acquittal was directed as to the 1944 and 1946 counts. (Supp. R. 175.) A motion to strike the evidence concerning the two 1947 capital gains was also granted. This was done because there was no direct evidence as to the sales price of the Eastwood realty or the cost of this or the Collins property. (Supp. R. 172–173.) Accordingly, the jury was instructed to disregard these items in the 1947 count. (Supp. R. 175–176.) On the depreciation item, the remaining evidence consisted solely of petitioner's income tax return for 1947 (Ex. 3; Supp. R. 43–44), and his admissions that he had added to the cost of the property in order to put him in a "no tax bracket" (Supp. R. 136–137).

Petitioner was convicted on the 1947 count and moved for a judgment of acquittal and for a new trial. (Supp. R. 19, 20.) Each motion was denied. (Supp. R. 21.) Petitioner was success-

ful in having the judgment reversed on appeal. Without giving specific instructions to the District Court, the Court of Appeals simply stated at the conclusion of its opinion "The judgment is reversed." *Spriggs* v. *United States,* 198 F. 2d 782, 783. The United States Attorney and the petitioner then entered into an agreement stipulating that the indictment be dismissed and that the sum of $1,500 previously deposited as fine and court costs be returned to petitioner. Accordingly, on October 15, 1952, an order was entered dismissing the indictment and authorizing payment of the amount deposited. (Ex. G; R. 9, 21–22, 35, 46, 229.)

PROCEEDINGS UNDER THE SECOND INDICTMENT

On February 26, 1953, a new one-count indictment was filed charging petitioner with the same attempted evasion of his taxes for 1947 as had been charged in the third count of the original indictment. (R. 1–2.) Petitioner filed a motion to dismiss (R. 4) and a plea in bar (R. 6–11), claiming that he was being subjected to double jeopardy. The record contains a minute entry of February 10, 1954, showing that the court had that day ordered both motions denied (R. 18), but a formal order was entered on February 25, 1954,[2] granting the plea in bar in so far as it

[2] The formal order recited that the action was taken on February 10, 1954. (R. 18–19.)

requested that the Government be prevented from again attempting to prove the capital gains realized during 1947 on the Collins and Eastwood properties (R. 7, 8, 10, 18–19, 22). However, the Government's motion for a rehearing (R. 19–28) was granted, and this order of February 25 was vacated on March 22, 1954 (R. 28–29).

The evidence to support the verdict of guilty at the second trial may be summarized as follows:

There was direct proof that petitioner, who is a lawyer (R. 70, 172–175, 184), realized unreported capital gains on the sale of the Collins and Eastwood properties, and that he fraudulently overstated depreciation on the Henshaw Road property. As to the realty sales, the parties to the transactions testified that petitioner had purchased the Collins and Eastwood properties for $5,500 (R. 77–78) and $2,000 (R. 66–67), respectively, selling them for $8,500 (R. 83–87, and $2,750 (R. 70–73). After certain adjustments there resulted a long term capital gain of $1,698.15 and a short term capital gain of $547.84, neither of which was reported on petitioner's income tax returns. (R. 204–205.)

As to the Henshaw Road depreciation item, the Government introduced evidence of the cost of the unimproved property and improvements thereto. By independent evidence and petitioner's admissions it was demonstrated that the total depreciable cost of the improvements to this

rental property amounted to only $18,924.10. (R. 98–101, 151–155, 164–166, 206–207, 219.) Yet, petitioner listed two items of $20,000 in his depreciation schedule, each referring to this same property. (R. 206.) At a conference, petitioner told the Treasury agents that he had added $20,000 to the cost of the property in his 1947 return so that he would not have to pay any tax for that year. (R. 201.) In discussions with other people, petitioner had boasted that there was no reason why one should pay any income tax if he knew how to take deductions. (R. 173, 221–222.)

ARGUMENT

1. Petitioner admits (Pet. 10) the validity of the rule that "a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted." *Ball* v. *United States,* 163 U. S. 662, 672; see also *Francis* v. *Resweber,* 329 U. S. 459, 462; *Bryan* v. *United States,* 338 U. S. 552, 560; 28 U. S. C., Section 2106. But, since the first opinion concluded with the statement, "The judgment is reversed",[3] petitioner argues (Pet. 10–17) that the Court of Appeals intended to direct the trial court to enter a judgment of acquittal as to the 1947 count, the only count remaining in the case at that stage.

[3] *Spriggs* v. *United States,* 198 F. 2d 782, 783.

The contention is without merit. The same Court of Appeals which rendered the first opinion, containing no statement directing an acquittal, has explained in the second opinion (Pet. 5a–6a) that it had no intention of directing an acquittal.[4] In the second opinion, the court said (Pet. 5a–6a):

> The judgment of conviction was reversed. There was no direction that the proceeding be dismissed. * * * He was not discharged by this Court. A reversal sets aside the judgment, but allows the indictment to stand.

Petitioner's elaborate interpretation of what the Court of Appeals meant by the word "reversed" in the first opinion must fail in the light of that court's own statement that it did not intend to direct an acquittal. It is clear that when the Court of Appeals ordered that the judgment be reversed, it meant no more than what it said. If it had meant to order a judgment of acquittal it would have said so, as it has done in the past. *Karn* v. *United States,* 158 F. 2d 568. Since the reversal and the new trial[5] were the result of

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[4] Judge Stephens sat as a member of the panel on both appeals.

[5] Petitioner makes the observation (Pet. 13) that he did not specifically assign as error the denial of his motion for a new trial in his statement of points on appeal, and therefore the trial court's ruling on the motion for new trial was not before the Court of Appeals. Obviously, however, where a Court of Appeals thinks reversal warranted for a

petitioner's own efforts, there is no question of double jeopardy.

Petitioner speculates (Pet. 15–16) that both prosecutor and defense counsel must have understood that the Court of Appeals had directed an acquittal, and that this was the reason they stipulated for a dismissal of the first indictment. But there are several ready answers. In the first place, had the reversal by the Court of Appeals directed the acquittal petitioner now seeks to find in it, there would of course have been no occasion for a stipulation. Secondly, had the parties intended to stipulate for a judgment of acquittal, they could readily have done so; all they actually agreed upon, however, was a dismissal of the indictment. Finally, it is clear, in any event, that counsel's misunderstanding, had there been one, of what the Court of Appeals meant by its reversal could not override the court's interpretation of its own mandate.

Petitioner concludes this point with the plainly unwarranted assertion (Pet. 16–17) "that the Court of Appeals now feels that its reversal of

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new trial but that appellant is not entitled to a judgment of acquittal, the Court of Appeals is free to grant a new trial, even though appellant has failed in terms to ask for it on appeal. The case here is not different from *Bryan* v. *United States*, *supra*, where this Court pointed out that, after he had moved for a new trial in the District Court, this was "one of the remedies which petitioner sought" (338 U. S. at 560) and could properly be ordered by the Court of Appeals. And see 28 U. S. C., Sec. 2106.

petitioner's first conviction was incorrect." Cf. *Sapir* v. *United States,* 348 U. S. 373. There is no basis for any such inference in the court's holding that it never directed an acquittal when it never said it was doing so. And, as we note again below (pp. 12–13), the court could with perfect consistency and propriety find, as it did, that the evidence at the second trial was sufficient for conviction though the evidence at the first trial had not been.

2. At the first trial the jury was instructed to disregard the evidence as to the capital gains from sale of the Collins and Eastwood properties, and petitioner was convicted on the 1947 count solely on the evidence of overstated depreciation on the Henshaw Road property. At the second trial the Government remedied the deficiencies in its proof as to the Collins and Eastwood properties, and the jury considered all three items in finding petitioner guilty of willfully attempting to evade his taxes for 1947. The contention (Pet. 17–22) that petitioner was subjected to double jeopardy because the Government was again allowed to introduce evidence as to the Collins and Eastwood properties is patently without merit.

Petitioner was not tried either time on three separate charges of failing to pay income taxes on three separate items of income for the year 1947. He was tried on the single charge of willfully attempting to evade his taxes for the year

1947, and the three items were separate pieces of evidence by which the Government sought to establish this single charge. The concept of jeopardy obviously applies to the offense charged and not to the various items of evidence adduced in proof of the charge.[6] Thus, cases which hold (Pet. 19–20) that the action of a trial judge in withholding a single count of a multiple count indictment from the jury constitutes a judgment of acquittal *pro tanto* have no application here.[7] *Miller* v. *United States,* 224 F. 2d 561 (C. A. 5th), certiorari denied December 5, 1955, No. 452, this Term.[8] Cf. *Trono* v. *United States,* 199 U. S. 521, 530, 533, 534, holding that a defendant convicted of a lesser included offense, who obtains a reversal on appeal, may then be convicted of the greater offense originally charged. Here, as there, "The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously

[6] "* * * nor shall any person be subject for the same *offence* to be twice put in jeopardy of life or limb * * *." Fifth Amendment, Constitution of the United States (emphasis added).

[7] Such authorities would, of course, have prevented the Government from attempting to reopen the 1944 and 1946 counts at the second trial, since a judgment of acquittal had been directed on those charges.

[8] The opinion of the Court of Appeals in the *Miller* case does not discuss this matter. However, the point is raised in the petition for certiorari. See the Government's brief in opposition, No. 452, this Term.

taken place." *Id.* at 533. Cf. *Palko* v. *Connecticut*, 302 U. S. 319.

Nor is there merit in petitioner's attempt to apply the doctrine of *res judicata* to the trial court's action at the second trial in prohibiting the Government, by its order of February 25, 1954, from introducing proof as to the Collins and Eastwood properties. The order was revoked after the Government had asked for a rehearing. The case was still before the District Court; no final order had been entered; and the trial court had jurisdiction to reverse any of its previous rulings upon a proper showing.

3. Petitioner's remaining contention (Pet. 22–24) is that the law of the case, following the decision of the Court of Appeals on the first appeal, precluded a holding that there was sufficient evidence to convict him at the second trial. Under this point, petitioner merely restates in effect his previous argument (Pet. 17–22) that evidence as to the unreported capital gains on the Collins and Eastwood properties, withdrawn from the jury at the first trial, had to be ignored at the second trial. The fallacy in the earlier formulation is equally fatal here. As we have shown, the Collins and Eastwood evidence was properly before the jury at the second trial, and this significant addition makes it perfectly understandable and proper that petitioner's second conviction should have been sustained though the first was reversed for insufficient evidence.

Though the Government had failed at the first trial to establish the unreported income from the

Collins and Eastwood transactions, the deficiency was supplied at the second trial. In addition to the testimony of the two sellers (R. 66–67, 77–78) and two buyers (R. 70–73, 83–87) as to the amounts paid when petitioner purchased and then sold for gain the Collins and Eastwood properties, independent evidence was introduced as to the cost of the depreciable property. Those who testified as to the latter were a real estate salesman (R. 95–105), a general building contractor (R. 150–163), and a carpenter (R. 163–169). This evidence was coupled with petitioner's admissions to the investigating agents (R. 202–203, 219) and his boasts to others (R. 173, 221–222). His admissions were corroborated by more than adequate independent evidence. *Opper* v. *United States,* 348 U. S. 84; *Smith* v. *United States,* 348 U. S. 147; *United States* v. *Calderon,* 348 U. S. 160. Cf. *Spriggs* v. *United States,* 198 F. 2d 782 (C. A. 9th).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956